BUGA SINGH v. KOH BON KEO

[A.C.J. (Raja Azlan Shah J.) July 16, 1966]

[K.L. — Civil Appeal No. 16 of 1966]

Practice and Procedure — Absence of plaintiff and his counsel — Case dismissed — Request for new trial.

In this matter the case of the appellant had been dismissed by the learned magistrate as on the date of the hearing neither the appellant nor his counsel was present in court. The appellant claimed for a new trial on the ground that it was not his mistake that his counsel had failed to appear.

Held: a new trial should be ordered, so long as the claim showed some merits and justice could be done by compensating the other side for any costs thrown away.

Case referred to:—

(1) *Hayman* v. *Rowlands* [1957] 1 All E.R. 323.

CIVIL APPEAL.

Appellant in person.

Lall Singh Muker for the respondent.

Raja Azlan Shah J. (delivering oral judgment): The appellant in this case is a business man in Klang and he claims that $552 is the balance owing to him on an I.O.U. chit dated 1st February 1952 which was executed by the respondent in favour of him. Paragraph 4 of the statement of claim avers that on three occasions in 1963 the respondent paid him a total sum of $48. That is denied by the respondent. The case came up for hearing from time to time but was postponed for various reasons. The case was finally heard before the learned magistrate at Klang on 5th October 1965. On that day both the appellant and his counsel were absent but respondent and his counsel were present. In the circumstances the learned magistrate dismissed the case with costs.

It is in that state of affairs that the case comes before me this morning. The appellant now claims for a new trial on the ground that it is not his mistake that his counsel had failed to appear.

To my mind, so long as the claim shows some merits and justice can be done by compensating the other side for any costs thrown away, then a new trial ought to be ordered. In the present case counsel for the respondent sought to argue that the claim bears no merits as it contravenes the limitation law, that is, the I.O.U. chit was executed in 1952 but action was brought in 1964. That may be so, but paragraph 4 of the statement of claim avers that in 1963 three sums of money were paid on various dates by the respondent in respect of the alleged loan. Therefore, if that averment is substantiated, the appellant's claim may be well founded as time runs afresh from date of payment, i.e. from 1963. That is an issue to be tried and, in my judgment, contains some merits.

It is not my intention to exegesise the law on this subject but I will merely refer to the case of *Hayman* v. *Rowlands* (1) where Denning L.J. had this to say:

> "I have always understood that, if by some oversight or mistake a party does not appear at the court on the day fixed for the hearing, and judgment goes against him but justice can be done by compensating the other side for any costs and trouble to which he has been put, then a new trial ought to be granted. The party asking for a new trial ought to show some defence on the merits, but, so long as he does so, the strength or weakness of it does not matter".

In my view there are some merits in the claim, and justice can be done by compensating the respondent for any costs thrown away. I will allow this appeal and order a fresh trial. The appellant will have to bear all costs thrown away by the respondent.

Appeal allowed.

Solicitors: *Lovelace & Hastings.*

BOOR SINGH v. ABDUL MAJEED

[A.C.J. (MacIntyre J.) July 16, 1966]

[Ipoh — Civil Appeal No. 11 of 1966]

Moneylenders — Acknowledgment by debtor of receipt of authenticated copy of promissory note — Onus of proof that provisions of Ordinance have not been complied with — Failure to keep regular books of account — Moneylenders Ordinance, 1951, ss. 16 and 18.

The learned president of the sessions court had dismissed a claim by the appellant for $1,700 and interest alleged to be due and owing on a promissory note executed by the respondent. The respondent had acknowledged receipt of an authenticated copy of the promissory note but at the trial he denied receipt of the copy. It was also alleged that the appellant had failed to keep regular books of accounts. The learned President dismissed the claim on the ground that the moneylender had failed to comply with the provisions of section 16(1) of the Moneylenders Ordinance, as he had failed to prove the delivery of the authenticated copy of the promissory note to the borrower.

Held: (1) the acknowledgment of receipt of the authenticated copy of the promissory note was sufficient, if unrebutted, to establish that the authenticated copy had been handed to the borrower and the onus was therefore on the borrower to prove that he did not receive it; the bare denial of the borrower was not sufficient to rebut the presumption arising from the signed acknowledgment;

(2) the court was not precluded from considering the evidence as to whether the claim was unenforceable for non-compliance with section 18(1) of the Moneylenders Ordinance and as it appeared in this case that the account books of the moneylender had not been regularly kept, the claim must be dismissed.

Cases referred to:—

(1) *Kartar Singh* v. *Mahinder Singh* [1959] M.L.J. 248.

(2) *Subramaniam* v. *Konar* [1962] M.L.J. 385.

(3) *Nawab Syed Alle Shah* v. *Mussamut Amanee Begum* (1873), 19 W.R. 149, 150.

(4) *Dinnath Rai* v. *Ram Rai* A.I.R. 1926 Patna 512.

(5) *Gladys Nugawela* v. *Soon Teck Finance Co.* [1960] M.L.J. 302. 304.

CIVIL APPEAL.

F. C. Arulanandom for the appellant.

P. P. Dharmananda for the respondent.

Cur. Adv. Vult.

MacIntyre J.: This is an appeal from the decision of the learned president of the sessions court at Ipoh, dismissing a claim for $1,700 and interest alleged to be due and owing on a promissory note executed by the respondent (hereinafter referred to as the defendant) in favour of the appellant (hereinafter referred to as the plaintiff). At all times material to the issues in this case the plaintiff was and is a registered moneylender.

In dismissing the action, the learned president held that the claim was unenforceable in law since the plaintiff had failed to prove delivery of the authenticated copy of the promissory note to the defendant as required under section 16(1) of the Moneylenders Ordinance of 1951; and also because the promissory note did not contain all the terms of the contract as required under section 16(3) and (4) of the said Ordinance.

At the trial, another ground of defence under section 18(2) of the Ordinance was pleaded when the plaintiff's attorney tendered in evidence the plaintiff's account books (P.3 and P.5) relating to the transactions between him and the defendant. It was contended that the books had not been regularly kept as all the entries appear to have been written in the same ink and the words and figures therein written at one and the same time. Although the statement of defence was not amended accordingly, counsel for the plaintiff joined issue and the trial proceeded on the basis that a plea under section 18(2) of the Ordinance aforesaid was in issue. The learned president, however, thought it unnecessary to decide the issue in view of his decision to dismiss the action for failure to comply with the provisions of section 16(1) of the Ordinance.

It was urged upon me by counsel for the appellant that the learned president had misdirected himself in law in holding that the onus of proof was upon the plaintiff, notwithstanding the production in evidence of a written acknowment signed by the defendant admitting the receipt of an authenticated copy of the promissory note. It would appear that the learned president in so deciding had based his decision on the ruling of the High Court in *Kartar Singh* v. *Mahinder Singh* [1] to the effect that the onus was on the moneylender to prove that the requirements of the Moneylenders Ordinance had been complied with; and it would also appear that because the plaintiff, who is in India, did not come forward to give evidence or cause a notice to be served on the defendant to produce the authenticated copy, the learned president felt impelled to draw the inference that had the plaintiff given evidence or the authenticated copy been produced in court, the evidence would have been unfavourable to him.

In *Kartar Singh's* case, *supra*, the borrower signed an acknowledgment admitting the receipt of a copy of the promissory note but the acknowledgment did not contain an admission that the copy was authenticated by the lender. Therein lies the difference between that case and this. The Court of Appeal, in *Subramaniam* v. *Konar* [2] held that where a borrower had given an acknowledgment in the form given by the defendant in this case, the acknowledgment was "sufficient if unrebutted, to establish that the copy which was handed to the borrower was authenticated."

As for the adverse inference drawn by the learned president because the plaintiff did not give evidence, he appears to have relied partly on the observation of the Indian Court of Appeal in *Nawab Syed Alle Shah* v. *Mussamut Amanee Begum* [3] and partly on a passage in the 3rd Volume of *Woodroffe and Ameer Ali* (11th Edition) at page 2256. The observation of the Court of Appeal, which incidentally is *obiter dicta*, are as follows:

> ". . . . it would be very desirable if native gentlemen would do that more frequently, because presumptions are necessarily made against them, if when parties in a court of justice, and facts are in dispute the knowledge of which must rest with them, they will not present themselves to the court to state their own evidence and knowledge of those facts. Presumptions are necessarily made against persons who will not subject themselves to examination when a *prima facie* case is made against them, and when by their own evidence they might have answered it".

The last observation above quoted would have been relevant to the instant case had not the onus shifted to the defendant to rebut the presumption that an authenticated copy of the promissory note had been delivered to him by virtue of his written acknowledgment to that effect.

The passage from *Woodroffe and Ameer Ali* reads as follows:

> "Where a party fails to call as his witness the principal person involved in the transaction who is in a position to give a firsthand account of the matters of controversy and throw light on them and who can refute all the allegations of the other side, it is legitimate to draw an adverse inference against the party who has not produced such principal witness".

It would be unrealistic to draw an inference in the circumstances of this case that because the plaintiff did not give evidence in court, his evidence would have been unfavourable to him had he done so. Besides, it is obvious that the above quoted passage from *Woodroffe and Ameer Ali* refers to the non-production of a material

witness other than a party to the action.

Finally, I fail to see the relevance of the failure of the plaintiff to serve a notice on the defendant to produce the authenticated copy of the promissory note. The plaintiff is under no compulsion of law to do so. Under section 66 of the Evidence Ordinance, he may serve a notice to produce a document in the possession of the opposite party if he wished to prove the contents thereof by secondary evidence; but it would serve no purpose to serve the notice if the opposite party denied the existence of the document. Such was the decision in *Dinnath Rai* v. *Ram Rai* [4] with which I agree. Ross J. supported by MacPherson J. said in that case, and I quote:

"In view of the pleadings it was idle for the plaintiff to give notice to the defendant to produce a document the existence of which he denied".

In my opinion, the bare denial of the defendant that an authenticated copy of the promissory note was delivered to him is not sufficient to rebut the presumption arising from his signed acknowledgment that he had received it.

In regard to the issue of whether the memorandum contained all the terms of the contract, the learned president relied on the oral evidence of the defendant and upon certain payments made by him to the plaintiff. He disbelieved the evidence of the plaintiff's attorney and, of course, I am not in a position to say that he was wrong.

However, we have on the one hand a promissory note for $1,700 executed voluntarily by the defendant on the 9th of December 1959 and his oral testimony on the other denying the receipt of the sum of $1,700. He also testified that he was given a sum of $700 only when the note was executed and the balance of $1,000 represented the amount due on an I.O.U. chit dated the 4th of April 1959 which was surrendered and destroyed when the promissory note was executed. This was a repetition of his plea in his amended statement of the defence, where he also alleged that after the execution of the promissory note he settled the sum of $1,700 due thereon partly by cheques amounting to $1,370 and cash amounting to $330.

The learned president failed to note that the defendant, in contradiction of his averment in the amended statement of defence, testified that a sum of $440 out of the aforesaid sum of $1,370 was paid by cheques D.6, D.7, D.8 and D.9 dated the 21st of August, 5th of September, 24th of September and the 6th of October 1959, respectively, that is to say long before the promissory note was executed. The defendant made no attempt to explain the discrepancy but on the basis of his own calculations the learned president came to the conclusion that the amount of debt outstanding with the sum actually borrowed when the defendant executed the note for $1,700 was $1,260. In arriving at this figure the learned president seems to have completely ignored Exh. D.18, a letter from the Indian Oversea Bank Ltd., showing that between the date of the execution of the I.O.U. chit for $1,000 and the date of the execution of the promissory note the total sum paid by the defendant to the plaintiff by cheques was not $440 but $1,259.20.

Having held that all the amounts shown in D.18 were paid by the defendant to the plaintiff to account of his debt and not to the plaintiff's attorney for milk sold and delivered and in the absence of any evidence by the defendant that these sums were paid to account of another debt or that he owed any sum to the plaintiff before the promissory note was executed other than the amount due on the I.O.U. chit for $1,000, the learned president should have held that when the I.O.U. chit was surrendered and destroyed there was no debt outstanding.

It must therefore follow that when the promissory note was executed there was no previous amount outstanding which could have been included in the sum of $1,700 secured by the promissory note and the plea under section 16(4) of the Ordinance does not arise. The issue before the court then was simply whether $1,700 or $700 was advanced on the promissory note. The onus was on the defendant to prove that he did not receive the full consideration mentioned in the note and that onus cannot be discharged by a mere denial which is what the defendant's evidence amounts to.

However, it is also clear from D.18 that the defendant had made various payments totalling $930 to the plaintiff after the execution of the promissory note and in the absence of evidence on behalf of the plaintiff that the amount had been appropriated to account of other debt or debts, if any, owed by the defendant to the plaintiff, the defendant is entitled to set-off against the amount claimed in this action, the respective amounts paid with interest accruing at the rate of 18% per annum from their respective dates of payment to date of issue of the writ.

Be that as it may, this court is not precluded from considering the evidence as to whether the claim is unenforceable for non-compliance with section 18(1) of the Moneylenders Ordinance. As Buttrose J. remarked in *Gladys Nugawela* v. *Soon Teck Finance Co.*, [5]

"the court in any event, so it seems to me, is bound to take notice of a matter such as this whether pleaded or not and will not seek to enforce a contract which is by statute rendered unenforceable".

P.3 and P.5 were produced in evidence by the

plaintiff's attorney by account books kept by the plaintiff in his moneylending business.

Section 18(1) reads as follows:

"Every moneylender shall keep or cause to be kept a regular account of each loan made after the commencement of this Ordinance clearly stating in plain words and in English numerals with or without the numerals of the script otherwise used the terms and transactions incidental to the account entered in a book paged and bound in such manner as not to facilitate the elimination of pages or the interpolation or substitution of pages".

To keep a regular account, in my opinion, would mean to keep an account book in which every entry is made as and when a transaction is completed and in chronological sequence. Section 18 further requires that the book should be so paged and bound so as "not to facilitate the elimination of pages or the interpolation or substitution of pages." It would be logical to infer from this directive that no blank pages should be left between the pages containing entries because such a practice would facilitate interpolation of entries.

In P.3 and P.5 there are no intervening blank pages, but it is evident that some of the intervening pages must have been left blank at some time or other. For instance, at page 17 of P.3 the date of the entry is 1st of July 1960 whereas the entries on pages 16 and 18 refer to transactions entered into on the 1st of January 1960. Again at page 32 a transaction dated the 28th of July 1960 is entered whereas the entry on page 33 relates to a transaction dated the 19th of May 1960 and the entry at page 34 is dated the 8th of January 1960. Likewise in P.5 an entry dated 11th of September 1959 appears at page 12 whereas an entry dated 31st of March 1959 appears at page 13. It is therefore clear that the entries were not made in chronological sequencec and that P.3 and P.5 were not regular accounts kept in accordance with the requirements of section 18(1). The entries above referred to must have been made on pages which had been left blank or the account books must have been written up at the end of each year and in so doing the entries were inadvertently mixed up. I therefore hold that by virtue of section 18(2) of the Moneylenders Ordinance the claim must fail.

The appeal is dismissed with costs.

Appeal dismissed.

Solicitors: *Arulanandom & Co.; Dharmananda & Co.*

PERIASAMY v. SUPPIAH

[A.C.J. (Raja Azlan Shah J.) July 18, 1966]

[Raub — Civil Appeal No. 1 of 1966]

Negligence — Damage caused by bull belonging to defendant — Whether bull of class of animals mansuetae naturae.

Animals mansuetae naturae — Control of bull by another — Right to control.

This was an appeal against the judgment of the learned president, who had awarded damages against the defendant for injuries caused to a bull of the plaintiff, which was pulling a cart, by the bull of the defendant. It was argued that the learned president was wrong in holding that the appellant was liable or that he was guilty of negligence.

Held: on the facts as found by the learned president there was ample evidence to justify his conclusion that the defendant (appellant) was negligent in allowing the bull to cause damage to the plaintiff's bull.

Cases referred to:—

(1) *Powell* v. *Strantham Manor Nursing Home* [1935] A.C. 243 at p. 256.

(2) *Barnes* v. *Lucille Ltd.* (1907), 96 L.T. 680.

(3) *Donoghue* v. *Stevenson* [1932] A.C. 562 at p. 580.

(4) *Samson* v. *Aitchison* [1912] A.C. 844.

(5) *Hewitt* v. *Bonvin* [1940] 1 K.B. 188, 195 - 196.

(6) *Norton* v. *Canadian Pacific Steamships Ltd.* [1961] 1 W.L.R. 1057.

(7) *Ormood* v. *Crosville Motor Services Ltd.* [1953] 1 W.L.R. 1120.

CIVIL APPEAL.

S. Kulasegaram for the appellant.

The respondent in person.

Raja Azlan Shah J. (delivering oral judgment): This is an appeal by the defendant against the judgment of the learned president, sessions court, sitting at Raub. The plaintiff testified that on the date and time in question he was driving a cart which was being pulled by two bulls along the Raub-Benta main road. The defendant's cattle, including a bull, were then grazing at the roadside. Suddenly the defendant's bull attacked one of the plaintiff's bulls, resulting in injuries to the latter animal. That is the case as alleged by the plaintiff in the court below. The defendant denied that he was the owner of the cattle including the bull in question. The learned president came to the conclusion that the bull which attacked the plaintiff's bull belonged to the defendant. He based his decision on the evidence of the plaintiff and witnesses Nos. 2, 3, 4 and 5. P.W.2 in evidence stated that he knew that the defendant owned the bull that attacked the plaintiff's bull. He had seen the defendant attending to the bull and giving it grass to eat at Sempalit. He also said that the defendant had owned the bull for the past one year. He had also seen the defendant escorting the cattle home. P.W.3 testified that he had bought four head of cattle from the defendant. P.W.4 had stated that he had bought fresh cow's milk from the defendant. P.W.5 said that he knew the defendant had a bull dark-brown in colour and that he had seen the defendant attending to his cattle in the cattle shed. On the other hand, the defendant testified that he had no bull on the date in question. It is a question of which